

PIPER & MARBURY

L.L.P.

1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430

202-861-3900

FAX: 202-223-2085

WRITER'S DIRECT NUMBER

202-861-6452

FAX: 202-223-2085

vschlesinger@pipermar.com

BALTIMORE
NEW YORK
PHILADELPHIA
EASTON

DOCKET FILE COPY ORIGINAL

RECEIVED

JUL 17 1996

July 17, 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

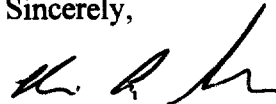
Re: In the Matter of Billed Party Preference for InterLATA 0+ Calls,
CC Docket No. 92-77

Dear Mr. Caton:

Enclosed please find an original and nine (9) copies of comments submitted by One Call Communications, Inc. d/b/a OPTICOM in response to the Commission's Second Further Notice of Proposed Rulemaking in the above-referenced proceeding. In addition, two copies of the aforementioned comments and a computer diskette are being submitted directly to the Common Carrier Bureau in accordance with the Commission's instructions.

Please acknowledge receipt on the supplemental copy provided and remit same to the bearer.

Sincerely,



Victoria A. Schlesinger

VAS/ab
Enclosure

No. of Copies rec'd
List ABCDE

No. of Copies rec'd
List ABCDE

029

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

DOCKET FILE COPY ORIGINAL

RECEIVED

JUL 17 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

)

)

Billed Party Preference for
InterLATA 0+ Calls

)

)

CC Docket No. 92-77

**COMMENTS OF ONE CALL COMMUNICATIONS, INC.
d/b/a OPTICOM**

Randall B. Lowe
Victoria A. Schlesinger

Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

DATE: July 17, 1996

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION AND SUMMARY	1
II. THE COMMISSION'S ALTERNATIVE BENCHMARK RATE PROPOSAL IS CONTRARY TO COMMISSION POLICY AND STATUTORY DIRECTIVE.....	3
III. THE BENCHMARK METHODOLOGY IS FLAWED UNSUPPORTED AND SUBJECT TO ABUSE.....	5
A. The Commission's Benchmark Methodology is Flawed	6
1. Call Characteristics	6
2. Price Margin.....	7
B. The Benchmark Methodology is Unsupported	7
C. The Benchmark Methodology is Subject to Abuse.....	8
IV. THE COMMISSION SHOULD ADOPT MANDATORY PRICE-DISCLOSURE OF 0+ CALLS.....	8
V. FORBEARANCE REGARDING INFORMATIONAL TARIFFS	9
VI. CONCLUSION	10

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Billed Party Preference for)	CC Docket No. 92-77
InterLATA 0+ Calls)	

**COMMENTS OF ONE CALL COMMUNICATIONS, INC.
d/b/a OPTICOM**

Pursuant to Section 1.415 of the Commission's Rules, One Call Communications, Inc. d/b/a OPTICOM ("Opticom"),¹ by its attorneys, hereby submits comments on the Commission's Second Further Notice of Proposed Rulemaking ("Second Further Notice")² in the above-referenced docket.

I. INTRODUCTION AND SUMMARY

Opticom continues to support the view that the costs of Billed Party Preference ("BPP") substantially outweigh any potential benefit to consumers.³ In addition, Opticom is of the opinion that most of the consumer safeguard issues that prompted the consideration of BPP have been alleviated by The Telephone Operator Consumer Services Improvement Act of 1990

¹One Call Communications, Inc. d/b/a OPTICOM is an interexchange carrier providing tariffed intrastate and interstate 0+ services throughout the United States.

²In the Matter of Billed Party Preference for InterLATA 0+ Calls, Second Further Notice of Proposed Rulemaking, CC Docket No. 92-77, June 6, 1996.

³See Comments of One Call Communications d/b/a OPTICOM, CC Docket No. 92-77, submitted April 12, 1995 at 2-4, Reply Comments of One Call Communications, Inc. d/b/a OPTICOM, CC Docket No. 92-77, submitted April 27, 1995 at 2.

("TOCSIA"),⁴ the Commission's regulations, and consumer education.⁵ As a result, Opticom supports the Commission's desire to adopt an alternative means by which to address the remaining consumer protection issue concerning the rates charged by various operator service providers ("OSPs"),⁶ to wit: the lack of adequate information needed by a calling party to make an informed decision regarding the selection of an OSP.⁷

Opticom supports the Commission's proposal to adopt a price disclosure requirement for all 0+ calls since it would provide consumers with all of the information necessary to make informed choices with little cost to consumers and OSPs alike.⁸ Additionally, a rule requiring OSPs to disclose their rates on 0+ calls obviates the need for benchmark rates⁹ and avoids the

⁴47 U.S.C. § 226 (1990).

⁵See Final Report of the Federal Communications Commission Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, released November 13, 1992, at 30 (stating that market forces are securing just and reasonable rates, and that consumers are protected from high rates through dial-around options) ("TOCSIA Final Report"); see also Proposal of the Competitive Telecommunications Association, *ex parte* communication, CC Docket No. 92-77 (released Mar. 13, 1995) at 1 ("CompTel Proposal"). Furthermore, there is ample evidence to support the notion that consumers are taking advantage of the choices available to them in the marketplace. In 1992, when BPP was first discussed, callers were not familiar with access code dialing. As a result, many callers found dial-around to be burdensome and confusing. Second Further Notice, ¶ 7. In the current OSP marketplace, however, consumers are more familiar with access code dialing due to increased advertising and vanity access code numbers. Indeed, statistics indicate that in 1995 more than 50 percent of callers dialing 0+ calls dialed around the presubscribed OSP. CompTel Proposal at 2. Moreover, and as stated by the Commission, dial-around traffic will likely increase as callers become even more familiar with dial-around options. TOCSIA Final Report at 31.

⁶Second Further Notice, ¶4.

⁷Id. ¶13. In its Second Further Notice, the Commission states that complaints and misconceptions regarding alternative operator services are due to a "lack of adequate information for callers to make an informed choice." Id. The Commission noted that, for many callers, the expectation is that rates charged for operator services would be comparable to those of their own presubscribed carrier or those of the local exchange company ("LEC"). Id. Thus, the Commission continues to receive numerous complaints from consumers who discover that their calls have been carried by a more expensive OSP after they receive a bill for 0+ services. Id.

⁸Id. ¶ 4.

⁹Id. ¶ 15.

legal and factual problems surrounding such a proposal.¹⁰ The concerns raised by the Commission regarding consumer misconceptions also would be eliminated if consumers received specific rate information via a mandatory price disclosure.¹¹ Lastly, a price disclosure requirement would eliminate the need for informational tariffs since the rate brand would provide consumers with price information at the time of purchase, thereby providing the optimal means by which to ensure that consumers are making informed decisions in the OSP marketplace.

II. THE COMMISSION'S ALTERNATIVE BENCHMARK RATE PROPOSAL IS CONTRARY TO COMMISSION POLICY AND STATUTORY DIRECTIVE

In its Second Further Notice, the Commission proposes an alternative to its price disclosure requirements, namely, adoption of benchmark rates based upon consumer expectations and an oral disclosure requirement for those OSPs whose rates exceed the benchmark by a certain percentage.¹² The Commission's proposal is problematic because it would result in non-cost based rates, as well as inequitable and discriminatory public conditioning.

The Commission's benchmark proposal does not include a consideration of individual carrier costs, even though cost considerations are fundamental to the determination as to whether a carrier's rates are just and reasonable in accordance with Section 201(b) of the Communications Act.¹³ In particular, the benchmark proposal ignores the different underlying costs borne by carriers and the economic disparities that exist between the three benchmark carriers and other OSPs. Thus, the Commission's proposal would create two groups of carriers; those who are able

¹⁰See *infra* Sections II and III.

¹¹The Commission noted that consumer misconceptions stem from "a lack of adequate information with respect to calls that are priced above a level consumers generally expect to pay." Second Further Notice, ¶ 14.

¹²*Id.*, ¶ 3.

¹³See e.g., MCI Telecommunications Corp. v. FCC, 675 F.2d 408, 410 (D.C. Cir. 1982), Farmers Union Central Exchange v. FERC, 734 F.2d 1486, 1502 (D.C. Cir.), *cert. den.*, 469 U.S. 1034 (1984).

to charge at or below the benchmark rates, and those who are unable to charge such rates. Some carriers, for instance, may have costs that surpass the benchmark whereas other carriers may have costs that are either below the benchmark or they are able to recover their costs through other means such as cross-subsidization and loss leaders.

Moreover, by subjecting some carriers to the oral disclosure rules irrespective of their costs,¹⁴ the Commission will be setting the stage for public conditioning that is adverse to competition. The inevitable result is that consumers will associate oral price disclosure with excessive rates.¹⁵ AT&T, MCI and Sprint, however, as the benchmark companies, will never be forced to rate brand regardless of the rates they charge consumers.¹⁶ The consequences in the marketplace for other OSPs will be severe since they will be forced to charge rates below the benchmark in order to get consumers to utilize their services. Rates set below the benchmark

¹⁴Specifically, the Commission concludes that the OSPs charging rates above the benchmark should be required to inform customers of the "total charges for which they would be liable for the initial rate period and each subsequent rate period." Second Further Notice, ¶ 35. In the alternative, the Commission proposes an oral disclosure requirement of the highest amount that could be charged to a caller for a domestic seven minute call, or an average rate for a seven minute call. *Id.* The Commission reasoned that such an oral disclosure requirement would be the most effective way to provide callers with an opportunity to make informed choices. *Id.* These proposed oral disclosure requirements, however, as applied only to carriers exceeding the benchmark, have a discriminatory effect. Therefore, if the Commission does adopt the benchmark proposal, it should require an oral disclosure requirement of a generic informational message stating that "rates are available upon request," which is the exact language required by TOCSIA in the event of unreasonable rates. 47 U.S.C. § 226(b)(1)(C). This type of generic statement would lessen the discriminatory effects of actual rate branding and remind callers that rate information may be obtained prior to making a call. Thus, such an oral disclosure requirement would strike an appropriate balance between the Commission's goal of informing callers and the carrier's goal of avoiding discrimination in the marketplace.

¹⁵For example, a consumer may receive a rate quote that is only slightly higher than that of the benchmark carrier, however, the caller will associate that announcement with excessive rates regardless of whether the difference in price would be acceptable to the caller, such as rates for superior services. *See infra* n. 19. Without a rate brand on all 0+ calls, the caller will have no frame of reference by which to determine whether the quoted rate is excessive. *See also infra* Section IV.

¹⁶Moreover, OSPs such as AT&T, MCI and Sprint already enjoy a substantial market share in several different markets, including operator services.

will not allow these carriers to recover their costs plus a reasonable profit and they will be unable to sustain themselves in the marketplace.¹⁷

In short, the practical implications of the benchmark proposal violate fundamental Commission policy and explicit statutory directives. As Congress stated in its Report on TOCSIA, a primary objective of that legislation was to allow legitimate companies to compete in the marketplace.¹⁸ Such companies can only survive if they are permitted to charge just and reasonable rates that allow them to recoup their costs of doing business in that marketplace.¹⁹ Thus, the practical implications of the Commission's proposal will actually hinder competition by preventing companies from competing in the OSP market.

III. THE BENCHMARK METHODOLOGY IS FLAWED, UNSUPPORTED AND SUBJECT TO ABUSE

The benchmark methodology proposed by the Commission is flawed because it ignores several cost elements that are fundamental to determining rates in a competitive environment.²⁰ In addition, the formula proposed by the Commission gives the benchmark carriers an opportunity to engage in anti-competitive conduct and predatory pricing.

¹⁷H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989).

¹⁸*Id.* at 2.

¹⁹The Commission states its belief that a disclosure requirement would "not necessarily harm those OSPs that charge relatively high rates, if they offer superior services...." Second Further Notice, ¶ 36. This view, however, ignores the realities of the marketplace, namely, that most carriers do not possess the economies of scale and scope of AT&T, MCI and Sprint, nor do they possess the ability of such carriers to understate costs or to gain market share through the loss of revenues. As a result, their costs and, hence, rates, are higher than the benchmark, irrespective of whether the service is superior.

²⁰*Id.*, ¶ 26.

A. The Commission's Benchmark Methodology is Flawed

1. Call Characteristics

In its Second Further Notice, the Commission is also seeking comment on its proposed benchmark structure which includes a consideration of six characteristics of 0+ calls.²¹ Among the call characteristics listed by the Commission, however, are characteristics that should not affect rates because they do not affect the underlying costs of carriers equally. Elements such as time of day and distance should be excluded from the proposed benchmark structure since these elements could force certain carriers to charge less during periods of heavy network traffic.²² In addition, these characteristics are contrary to the industry trend of nationwide flat rates. Accordingly, Opticom would urge the Commission to exclude those characteristics from the benchmark formulation.

Furthermore, the list of characteristics proposed by the Commission does not take into account the costs of competing in the marketplace. Necessary cost elements such as property imposed fees ("PIFs") and commissions are not included in the Commission's benchmark calculation. These cost elements are economic incentives that carriers need to offer to attract business in order to compete in the OSP marketplace and as such they are as much a cost of doing business as any other cost.²³

²¹See id. The Commission's benchmark structure includes the following call characteristics: "(1) how much live or automated operator assistance it requires; (2) whether the called number is entered by the caller; (3) the time of day; (4) whether it lasted for the initial minute only or whether it included subsequent minutes; (5) the distance covered; and (6) whose credit card is used." *Id.*

²²For example, discounts occurring during the evening and night would force OSPs such as Opticom to give discounts during peak network traffic hours.

²³See In the Matter of National Telephone Services, Inc., Petition for Declaratory Ruling that the Untariffed Payment of Commissions by Dominant Carriers to Customers Violates Section 203 of the Communications Act, Memorandum Opinion and Order, 8 FCC Rcd. 654, 655 (1993) (holding that commission payments to aggregators for the delivery of 0+ traffic are "a legitimate business expense"); see also In the Matter of Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd. 1719, 1726

(Footnote continued to next page)

These aberrations in call characteristics and cost elements will result in rates that inaccurately reflect the cost of service for some carriers. As Opticom stated earlier, carrier rates differ because underlying costs of doing business differ, especially alternative OSPs compared with the benchmark OSPs. Consequently, a failure by the Commission to consider cost elements that are a necessary part of doing business will result in non-cost based, benchmark rates.

2. Price Margin

In establishing a benchmark structure, the Commission also proposes an additional price margin of 15 percent in order to give OSPs some flexibility in setting their rates.²⁴ A price margin of 15 percent, however, is not adequate to allow for differences in underlying costs.²⁵ As a result, if the Commission adopts the benchmark proposal, Opticom advocates a more flexible price margin that would allow carriers to at least attempt to account for differences in costs. At a minimum, the Commission should consider adopting a variance that is two to three times the benchmark rates adopted by the Commission.²⁶ A price margin of two to three times the benchmark rates would more accurately reflect the differences in costs borne by OSPs.

B. The Benchmark Methodology is Unsupported

Opticom is also concerned about potential abuse of the benchmark structure. Many of these problems are a result of the Commission's decision to establish benchmarks at a level

(Footnote continued from previous page)

(1991) (stating that commission payments are legitimate expenses and that they are "marketing expenses, no different in purpose than a company hiring salaried employees to market products").

²⁴Second Further Notice, ¶ 24.

²⁵Larger carriers, such as AT&T, MCI, and Sprint, have economies of scope and scale that are unavailable to smaller carriers. *See supra* n. 19. Furthermore, such carriers are usually providers of multiple services allowing cross-service subsidization. The proposed 15 percent price margin, therefore, is not only unsupported, but like the benchmark proposal, it completely ignores cost differences among carriers.

²⁶*See e.g.*, 1995 Mich. Pub. Acts § 317 (6) (Nov. 30, 1995) (capping operator services or toll services at 3 times the state average rate). Indeed, numerous other states have no price cap.

approximating the average price charged by AT&T, MCI and Sprint.²⁷ The Commission reasoned that consumers "generally expect rate levels to be within a comparable range of rates charged by the three largest carriers."²⁸ The Commission, however, provides no support for such a conclusion nor for such expectations resulting in excessive rates, *i.e.*, rates based on costs plus a reasonable profit.²⁹

C. The Benchmark Methodology Is Subject to Abuse

Moreover, even if such rates were reasonable, the Commission has not proposed any safeguards to ensure that such rates remain reasonable. Large OSPs such as AT&T, MCI and Sprint have wide latitude in setting their rates due to their large market share and other service offerings. Consequently, these carriers could engage in predatory pricing by reducing the cost of calls so dramatically as to destroy the ability of other OSPs to compete in the marketplace.³⁰

IV. THE COMMISSION SHOULD ADOPT MANDATORY PRICE-DISCLOSURE OF 0+ CALLS

Opticom supports the Commission's proposal to impose a requirement on all OSPs to orally disclose their rates to consumers when a call is placed.³¹ A price-disclosure requirement or "rate brand" is the most "effective and efficient" means by which to ensure that consumers

²⁷*Id.* ¶ 23

²⁸*Id.*

²⁹*See supra* n. 17.

³⁰*See* Attachment 1 (illustrating the types of price manipulation which may occur under the proposed benchmark methodology).

³¹Such a rate brand requirement could immediately address many of the concerns prompting the consideration of BPP and at a much lower cost to consumers and carriers. *Second Further Notice*, ¶ 37. Moreover, the costs associated with a disclosure requirement would be minimal. Most OSPs already have the technology to allow for full disclosure when a call is made and prior to the time charges are incurred.

have adequate rate information, thereby allowing them to make informed choices.³² It also would avoid all of the problems of discrimination and the other flaws of the Commission's benchmark proposal described above. A rate band by all OSPs for all OSP calls would also dispel any misconceptions regarding the rates charged by the presubscribed OSP.³³

A rate announcement also would give callers a frame of reference regarding OSP charges. Callers could obtain a better understanding of the rates typically charged by OSPs, which would assist consumers in their efforts to make more educated buying decisions. In turn, the ability of consumers to make informed choices and educated decisions regarding the operator services they are purchasing will result in more effective competition.

V. FORBEARANCE REGARDING INFORMATIONAL TARIFFS

Finally, the Commission is soliciting comments on whether it should exercise its new forbearance authority with respect to the filing of informational tariffs.³⁴ Specifically, the Commission is seeking comment on whether the informational tariff filing requirement of TOCSIA³⁵ is effective in putting consumers on notice of an OSP's rates.³⁶ The Commission noted that excessive rates and rate complaints persist even though such rates are provided to the

³²*Id.* (requesting comments on disclosure requirements would "represent more effective and efficient means for providing consumers with the information they need to make fully informed decisions regarding the choice of an OSP").

³³As the Commission stated in its Second Further Notice, "disclosure requirements would ensure that consumers do not unintentionally or inadvertently use carriers that charge unexpected high rates for interstate calls." *Id.* ¶ 36. Although the Commission discussed this issue in the context of a disclosure requirement for rates exceeding the benchmark, the same reasoning is applicable to a general disclosure requirement.

³⁴*Id.*, ¶ 40. TOCSIA also authorizes the Commission to waive the tariff requirement if certain conditions are met. *Id.*

³⁵47 U.S.C. § 226(h)(1).

³⁶Second Further Notice, ¶ 40.

public.³⁷ Because such tariffs are seemingly ineffective at providing notice to the public, the Commission is seeking comment on its proposal to adopt a mandatory detariffing policy with regard to informational tariffs.³⁸

Opticom agrees with the Commission's conclusion that informational tariffs are not effective in protecting consumers because they cannot provide information at the time of purchase.³⁹ As the Commission stated in its Second Further Notice, many 0+ calls made from aggregator locations are placed by transient callers who have a limited ability to learn about a particular carrier at that time.⁴⁰ Opticom supports the Commission's alternative proposal of a mandatory price disclosure as the best "long-term solution for protecting consumers."⁴¹ Because consumers would be able to obtain complete rate information regarding the price of their call at the time of purchase, informational tariffs would be unnecessary for the protection of consumers. Opticom, therefore, supports a mandatory detariffing policy with regard to informational tariffs.

VI. CONCLUSION

For the foregoing reasons, Opticom supports an oral price-disclosure requirement on all 0+ calls as a workable and inexpensive alternative by which to address the Commission's remaining consumer issues. Such "rate brand" would give consumers the information they need to make educated buying decisions and allow carriers to charge just and reasonable rates in

³⁷*Id.* ¶¶ 41-42 (stating that tariffs do not necessarily ensure just and reasonable rates and noting the numerous complaints filed with Commission).

³⁸*Id.* ¶¶ 40-44.

³⁹*Id.* ¶ 42 (noting that the lack of price disclosure at the time of purchase and the transient status of the caller prevent tariffs from ensuring that consumers are not charged more for 0+ calls than they would be willing to pay).

⁴⁰*Id.*

⁴¹*Id.* See *supra* discussion Section III.

accordance with the objectives of the Communications Act. In addition, a price-disclosure would obviate the need for benchmark rates and the problematic issues surrounding that proposal. Consequently, Opticom urges the Commission to adopt a mandatory, oral price-disclosure requirement for all 0+ calls made from payphones.

Respectfully submitted,

One Call Communications, Inc. d/b/a

OPTICOM



Randall B. Lowe

Victoria A. Schlesinger

Piper & Marbury L.L.P.
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

DATE: July 17, 1996

ATTACHMENT 1

Carrier	Tariffed Rate	Relative Percentage	Weighted Average
AT&T	2.25	69%	1.55
MCI	2.25	18%	0.41
Sprint	2.20	13%	0.29
Weighted Rate	n/a	100%	2.24

If benchmark is 2.24 are two carriers over it?

Carrier	Tariffed Rate	Relative Percentage	Weighted Average
AT&T	1.00	69%	0.69
MCI	2.25	18%	0.41
Sprint	2.20	13%	0.29
Weighted Rate	n/a	100%	1.38

Could AT&T force out competitors with this?

Carrier	Tariffed Rate	Relative Percentage	Weighted Average
AT&T	2.25	69%	1.55
MCI	2.25	18%	0.41
Sprint	4.00	13%	0.52
Weighted Rate	n/a	100%	2.48

Can Sprint do this? Charge \$1.52 more than benchmark? Are they over?